1 2 3	COMMONWEALTH OF KENTUCKY BEFORE THE PUBLIC SERVICE COMMISSION		
4	IN THE MATTER OF:		
5			
6	ELECTRONIC APPLICATION OF) BIG RIVERS ELECTRIC CORPORATION) Case No. FOR APPROVAL OF SOLAR POWER) 2020-00183 CONTRACTS		
	MOTION OF BIG RIVERS ELECTRIC CORPORATION FOR		
7 8	CONFIDENTIAL PROTECTION CONFIDENTIAL PROTECTION		
9 10	1. Big Rivers Electric Corporation hereby moves the Kentucky Public		
11	Service Commission ("Commission") pursuant to KRS 278.160(3), KRS		
12	61.878(1)(c)(1), and 807 KAR 5:001 Section 13 to grant confidential protection to		
13	certain information contained in Big Rivers' Response to Commission Staff's Initial		
14	Request for Information and in Big Rivers' Response to the Office of the Attorney		
15	General's First Request for Information. The information for which Big Rivers		
16	seeks confidential treatment is hereinafter referred to as the " $Confidential$		
17	Information." The Confidential Information includes:		
18	a. Portions of the response and/or attachments for the responses to Items		
19	4, 6, 7, 17, 25, 27, 28, and 29 of the Commission Staff's First Request for		
20	Information ("PSC 1-4," "PSC 1-6," "PSC 1-7," "PSC 1-17," "PSC 1-25," "PSC		
21	1-27," "PSC 1-28," and "PSC 1-29," respectively); and		
22	b. Portions of the responses and/or attachments for the responses to		
23	Items 1, 2, 4, 9, 10, 15, 16, 18, 19, 20, 33, 42, and 43 of Attorney General's		
24	First Request for Information ("AG 1-1," "AG 1-2," "AG 1-4," "AG 1-9," "AG 1-		

- 1 10," "AG 1-15," "AG 1-16," "AG 1-18," "AG 1-19," "AG 1-20," "AG 1-27," "AG1-
- 2 31," "AG 1-32," "AG 1-33," "AG 1-42," and "AG 1-43," respectively).
- Pursuant to the Commission's March 24, 2020, Order in *In the Matter*
- 4 of Electronic Emergency Docket Related to the Novel Coronavirus COVID-19, Case
- 5 No. 2020-00085 ("Case No. 2020-00085"), one (1) copy of the Confidential
- 6 Information highlighted with transparent ink, printed on yellow paper, or otherwise
- 7 marked "CONFIDENTIAL," is being field with this motion by electronic mail or
- 8 posting on a secure file share site. A copy of those pages, with the Confidential
- 9 Information redacted, is being electronically filed with the Application
- 10 accompanying this motion.
- 11 3. A copy of this motion with the Confidential Information redacted has
- been served on all parties to this proceeding through the use of electronic filing. <u>807</u>
- 13 KAR 5:001 Section 13(b).
- 4. If and to the extent the Confidential Information becomes generally
- available to the public, whether through filings required by other agencies or
- otherwise, Big Rivers will notify the Commission and have its confidential status
- 17 removed. <u>807 KAR 5:001 Section 13(10)(b).</u>
- 18 5. As discussed below, the Confidential Information is entitled to
- 19 confidential treatment under KRS 61.878(1)(a) or KRS 61.878(1)(c)(1). <u>807 KAR</u>
- 5:001 Section 13(2)(a)(1). Public disclosure of the certain information contained in
- 21 Big Rivers' Response to Commission Staff's Initial Request for Information and in

- 1 Big Rivers' Response to the Office of the Attorney General's First Request for
- 2 Information, would permit such a result as discussed fully below.

3 INFORMATION PROTECTED UNDER KRS 61.878(1)(a)

- 4 6. The Confidential Information contained in Big Rivers' response to AG
- 5 1-15 consists of the energy usage of individual retail customers on the Big Rivers
- 6 system, and is entitled to protection under KRS 61.878(1)(a), which protects from
- 7 public disclosure "records containing information of a personal nature where the
- 8 public disclosure thereof would constitute a clearly unwarranted invasion of
- 9 personal privacy."
- To Because the retail customers listed in the response to AG 1-15 are not
- 11 parties to this proceeding, publicly revealing such information would constitute a
- 12 clearly unwarranted invasion of personal privacy. Moreover, the Commission has
- previously granted confidential treatment to similar retail customer usage
- information. See, e.g., In the Matter of: Sanctuary Church v. Louisville Gas and
- 15 Electric Company, P.S.C. Case No. 2018-00181, Order (Jan. 8, 2019) (granting
- 16 confidential treatment pursuant to KRS 61.878(1)(a) for an indefinite period to a
- 17 retail customer's account and usage information); *In the Matter of: Application of*
- 18 Kentucky Utilities Company for an Adjustment of its Electric Rates, P.S.C. Case No.
- 19 2012-00221, Order (July 25, 2013) (holding customer names, account numbers, and
- 20 usage information exempt from disclosure under KRS 61.878(1)(a)). As such, Big
- 21 Rivers requests confidential treatment for the Confidential Information in the

response to AG 1-15 to protect the private usage information of the listed retail
 customers.

INFORMATION PROTECTED BY KRS 61.878(1)(c)

8. KRS 61.878(1)(c)(1) protects "records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records." Section I below explains that Big Rivers operates in competitive environments in the wholesale power market and in the credit market. Section II below shows that the Confidential Information is generally recognized as confidential or proprietary. Section III below demonstrates that public disclosure of the Confidential Information would permit an unfair commercial advantage to Big Rivers'

14 SECTION I

competitors, as well as the Solar Developer's competitors.

Big Rivers Faces Actual Competition

9. As a generation and transmission cooperative, Big Rivers competes in the wholesale power market. This includes not only the short-term bilateral energy market, the day-ahead and real time energy and ancillary services markets, and the capacity market to which Big Rivers has access by virtue of its membership in the Midcontinent Independent System Operator, Inc. ("MISO") system, but also forward bilateral long-term agreements and wholesale agreements with utilities and industrial customers. Big Rivers' ability to successfully compete in the market is dependent upon a combination of its ability to: 1) obtain the maximum price for the

- 1 power it sells, and 2) keep its cost of production or purchase as low as possible.
- 2 Fundamentally, if Big Rivers' cost of producing or purchasing a unit of power
- 3 increases, its ability to sell that unit in competition with other utilities is adversely
- 4 affected. In fact, the Commission recognizing the competitive market for purchase
- 5 power agreements when it stated, "[I]n this era of increasing competition,
- 6 utilities should be able to purchase power without prior Commission approval"
- 7 (emphases added).¹
- 8 10. Big Rivers also competes for reasonably priced credit in the credit
- 9 markets, and its ability to compete is directly impacted by its financial results.
- 10 Lower revenues and any events that adversely affect Big Rivers' margins will
- adversely affect its financial results and potentially impact the price it pays for
- 12 credit. A competitor armed with Big Rivers' proprietary and confidential
- information will be able to increase Big Rivers' costs or decrease Big Rivers'
- revenues, which could in turn affect Big Rivers' apparent creditworthiness. A
- utility the size of Big Rivers that operates generation and transmission facilities
- will always have periodic cash and borrowing requirements for both anticipated and
- 17 unanticipated needs. Big Rivers expects to be in the credit markets on a regular
- basis in the future, and it is imperative that Big Rivers improve and maintain its
- 19 credit profile.

¹ In the Matter of: The Consideration and Determination of the Appropriateness of Implementing a Ratemaking Standard Pertaining to the Purchase of Long-Term Wholesale Power by Electricity Utilities as Required in Section 712 of the Energy Policy Action of 1992, P.S.C. Administrative Case No. 350, Order at 8 (October 25, 1993).

11. Finally, the ability to negotiate the most advantageous power purchase agreements and then offer competitive prices to Big Rivers' Members, companies interested in expanding in Kentucky, such as Nucor Corporation ("Nucor"), and potential new Members is fundamental to Big Rivers' continued success.

SECTION II

The Confidential Information is Generally Recognized as Confidential or Proprietary

- 12. The Confidential Information for which Big Rivers seeks confidential treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or proprietary under Kentucky law, and consists of:
 - the subject of this proceeding between Big Rivers and Henderson County Solar, LLC, Meade County Solar, LLC, and McCracken County Solar, LLC (collectively, the "Solar Developers"), contained in the responses to PSC 1-4, PSC 1-6, PSC 1-17, PSC 1-28, AG 1-10, AG 1-19, AG 1-33, and AG 1-43;
 - b. Information regarding confidential bids submitted in response to a Request for Proposals ("RFP") issued by Big Rivers, which resulted in the three solar contracts that are the subject of this proceeding, along with Big Rivers' internal, confidential screening and evaluation of those bids, contained in the responses to AG 1-2 and AG 1-18 and in the attachments to the response to PSC 1-7;

c. A confidential Request for Information ("RFI") provided to Big Rivers

by an economic development prospect, contained in the attachment to

the response to AG 1-4;

- d. The negotiated, confidential terms of special contracts with Nucor Corporation, Owensboro Municipal Utilities, and the Kentucky Municipal Energy Agency contained in the responses to PSC 1-4, PSC 1-6, PSC 1-17, PSC 1-28, PSC 1-29, AG 1-2, AG 1-16, AG 1-19, and AG 1-33;
- e. Big Rivers' confidential and proprietary financial information, including its projections of its capacity position, energy market prices, market prices for renewable energy credits ("RECs"), and capacity market prices, contained in the response and the attachment to the response to PSC 1-17; and
- f. Big Rivers' economic analysis of the three solar contracts that are the subject of this proceeding, which reveals the confidential terms of the solar contracts, as well as Big Rivers' confidential and proprietary financial information and projections, including market price projections, contained in the responses to AG 1-1, AG 1-9, AG 1-16, AG 1-20, AG 1-32, and AG 1-42, and in the attachments to the responses to PSC 1-25 and PSC 1-27.
- 13. As noted above and fully discussed below, the Confidential Information consists of the negotiated, confidential terms of the three solar contracts that are

- 1 the subject of this proceeding; the negotiated, confidential terms of the special
- 2 contracts with Nucor, OMU, and KyMEA; confidential and proprietary financial
- 3 information including projections of market prices and Big Rivers' capacity position;
- 4 a confidential RFI provided by an economic development prospect; and confidential
- 5 bid information submitted in response to Big Rivers' solar RFP and Big Rivers'
- 6 evaluations of those bids.
- 7 14. Public disclosure of such information would give Big Rivers' suppliers,
- 8 buyers, and competitors insight into Big Rivers' view of future energy, capacity, and
- 9 REC prices; the contract terms Big Rivers has agreed to in the past; Big Rivers' cost
- of producing power; Big Rivers' need and availability of power; and the market
- conditions Big Rivers expects to encounter, all of which would indicate the prices
- and terms on which Big Rivers is willing to buy or sell such commodities.
- 15. Information about a company's detailed inner workings is generally
- recognized as confidential or proprietary. See, e.g., Hoy v. Kentucky Indus.
- 15 Revitalization Authority, 907 S.W.2d 766, 768 (Ky. 1995) ("It does not take a degree
- in finance to recognize that such information concerning the inner workings of a
- corporation is 'generally recognized as confidential or proprietary"); *Marina*
- 18 Management Servs. v. Cabinet for Tourism, Dep't of Parks, 906 S.W.2d 318, 319 (Ky.
- 19 1995) (unfair commercial advantage arises simply from "the ability to ascertain the
- 20 economic status of the entities without the hurdles systemically associated with the
- 21 acquisition of such information about privately owned organizations").

- 1 16. Moreover, the Commission has previously granted confidential
- 2 treatment to similar information. See, e.g., In the Matter of: An Examination of the
- 3 Application of the Fuel Adjustment Clause of Kentucky Power Company from
- 4 November 1, 2012 through October 31, 2014, P.S.C. Case No. 2014-00450, Order
- 5 (Jan. 24, 2019) (granting confidential treatment to planned outage schedules, coal
- 6 bid analysis information, and forecasted fuel cost and sales data); *In the Matter of:*
- 7 Electronic Examination of the Application of the Fuel Adjustment Clause of Big
- 8 Rivers Electric Corporation from November 1, 2017 through April 30, 2018, P.S.C.
- 9 Case No. 2018-00221, Order (Oct. 16, 2018) (granting confidential treatment to the
- 10 terms of future off-system sales).
- 17. In fact, the Commission has granted confidential treatment for the
- same Nucor contract terms for which Big Rivers seeks confidential treatment in this
- proceeding, as well as Big Rivers' economic analysis of the Nucor contract. See In
- 14 the Matter of: Electronic Joint Application of Big Rivers Electric Corporation and
- 15 Meade County Rural Electric Cooperative Corporation for (1) Approval of Contracts
- 16 for Electric Service with Nucor Corporation; and (2) Approval of Tariff, P.S.C. Case
- No. 2019-00365, Order (Jan. 22, 2020); see also In the Matter of: Application of
- 18 Kentucky Power Company for Approval of Renewable Energy Purchase Agreement
- 19 for Wind Energy Resources Between Kentucky Power Company and FPL Illinois
- 20 Wind, LLC. P.S.C. Case No. 2009-00545, Order (July 31, 2019) (granting
- 21 confidential treatment to confidential contract terms).

- 1 18. The Confidential Information is not publicly available, is not
- 2 disseminated within Big Rivers except to those employees and professionals with a
- 3 legitimate business need to know and act upon the information, and is not
- 4 disseminated to others without a legitimate need to know and act upon the
- 5 information. As such, the Confidential Information is generally recognized as
- 6 confidential and proprietary.

7 SECTION III

<u>Disclosure of the Confidential Information Would Permit an Unfair</u> Commercial Advantage to Big Rivers' Competitors

- 19. Public disclosure of the Confidential Information will adversely affect Big Rivers in several respects.
- 20. First, public disclosure of Big Rivers' financial and market price projections, Big Rivers' projections of its capacity position, or the confidential price and other significant terms of the solar, Nucor, OMU, or KyMEA contracts will place Big Rivers at a considerable disadvantage when negotiating future contracts. Public disclosure of such information will provide insight into Big Rivers' cost of producing power and indicate the prices at and terms on which it is willing to sell and purchase power, capacity, REC's, and other commodities. Potential buyers or sellers of power to Big Rivers could use the Confidential Information as a benchmark in negotiating the terms of a transaction. The Commission recognized this danger in P.S.C. Case No. 2003-00054, where Union Light, Heat & Power ("ULH&P") argued, and the Commission implicitly accepted, that if the bids it received were publicly disclosed, contractors on future work could use the bids as a

- benchmark, which would likely lead to the submission of higher bids. *In the Matter*
- 2 of: Application of the Union Light, Heat and Power Company for Confidential
- 3 Treatment, P.S.C. Case No. 2003-00054, Order (Aug. 4, 2003). The Commission also
- 4 implicitly accepted ULH&P's further argument that the higher bids would lessen
- 5 ULH&P's ability to compete with other gas suppliers. *Id*.
- 6 21. Likewise, in P.S.C. Case No. 2018-00056, the Commission granted
- 7 confidential treatment to the pricing terms of a contract, recognizing "that the
- 8 specific cost information may be used to the financial detriment of Cumberland
- 9 Valley and its ratepayers by allowing potential future vendors to bid just under the
- 10 cost of its current vendor, which, in turn, would place Cumberland Valley at a
- 11 competitive disadvantage." In the Matter of: Application of Cumberland Valley
- 12 Electric, Inc. for Commission Approval for a Certificate of Public Convenience and
- Necessity to Install an Advanced Metering Infrastructure (AMI) System Pursuant to
- 14 KRS 807 KAR 5:001 and KRS 278.020, P.S.C. Case No. 2018-00056, Order (May 9,
- 15 2018).
- 16 22. Similarly, potential suppliers or buyers manipulating Big Rivers'
- 17 bidding process would lead to higher costs or lower revenues to Big Rivers and
- 18 would place it at an unfair competitive disadvantage in the wholesale power market
- 19 and credit markets.
- 20 23. Further, if confidential treatment of the confidential, negotiated terms
- of the solar, Nucor, OMU, or KyMEA contracts; the RFI provided by an economic
- development prospect; or the bid information or bid analyses is denied, then other

- 1 economic development prospects and companies interested in buying or selling
- 2 power in Kentucky would know that the confidential terms of their future contracts,
- 3 plans, or bids may also be publicly disclosed. Many companies would be reluctant to
- 4 have such confidential and proprietary information disclosed because public
- 5 disclosure would, for example, allow their competitors to know how they offer and
- 6 price their projects. This would create precisely the kind of competitive harm KRS
- 61.878(1)(c)(1) is intended to prevent.
- 8 24. Because companies would not want their confidential and proprietary
- 9 information disclosed to their competitors, public disclosure of the Confidential
- 10 Information in this case would likely reduce the pool of companies willing to
- 11 negotiate with Big Rivers, reducing Big Rivers' and other utilities' ability to secure
- economic development prospects and the best terms in power purchase agreements.
- 13 Big Rivers' competition for future renewable purchase contracts is not limited to its
- 14 traditional regulated competitors. Large industrial consumers, municipals, cities,
- and communities are reaching out to solar developers as well.
- 16 25. The Commission has also recognized this real danger to utilities in
- 17 Kentucky. In P.S.C. Case No. 2003-00054, the Commission granted confidential
- protection for bids submitted to ULH&P. ULH&P argued, and the Commission
- implicitly accepted, that the bidding contractors would not want their bid
- 20 information publicly disclosed, and that disclosure would reduce the contractor pool
- 21 available to ULH&P, which would drive up ULH&P's costs, hurting its ability to
- 22 compete with other gas suppliers. In the Matter of: Application of the Union Light,

- 1 Heat and Power Company for Confidential Treatment, P.S.C. Case No. 2003-00054,
- 2 Order (August 4, 2003). Similarly, in Hoy v. Kentucky Indus. Revitalization
- 3 Authority, the Kentucky Supreme Court found that without protection for
- 4 confidential information provided to a public agency, "companies would be reluctant
- 5 to apply for investment tax credits for fear the confidentiality of financial
- 6 information would be compromised." Hoy v. Kentucky Indus. Revitalization
- 7 Authority, 907 S.W.2d 766, 769 (Ky. 1995).
- 8 26. Accordingly, the public disclosure of the Confidential Information
- 9 would provide Big Rivers' competitors with an unfair commercial advantage.

10 <u>SECTION IV</u>

11 <u>Time Period</u>

- 12 27. Big Rivers requests that the Confidential Information contained in the
- 13 response and the attachment to the response to PSC 1-17 (projected market prices
- and capacity position) remain confidential for 5 years from the date of this motion,
- 15 which will allow sufficient time for the information to become sufficiently outdated
- to no longer pose a competitive risk to Big Rivers. <u>807 KAR 5:001 Section</u>
- 17 $\underline{13(2)(a)(2)}$.
- 18 28. Big Rivers requests the Confidential Information contained in the
- 19 response to AG 1-15 (customer usage) remain confidentially indefinitely so as to
- 20 protect private customer usage information. See In the Matter of: Sanctuary Church
- v. Louisville Gas and Electric Company, Order, P.S.C. Case No. 2018-00181
- 22 (January 8, 2019) (granting confidential treatment for an indefinite period to
- 23 detailed account and usage information of a non-party).

- 1 29. Big Rivers requests that all other Confidential Information, which
- 2 includes the confidential contract terms and analysis, the RFI, and the bid
- 3 information and analysis, remain confidential indefinitely because for so long as Big
- 4 Rivers is in the wholesale power market, the public disclosure of the Confidential
- 5 Information can be used to Big Rivers' competitive disadvantage for the reasons
- 6 stated above. See In the Matter of: Electronic Joint Application of Big Rivers
- 7 Electric Corporation and Meade County Rural Electric Cooperative Corporation for
- 8 (1) Approval of Contracts for Electric Service with Nucor Corporation; and (2)
- 9 Approval of Tariff, P.S.C. Case No. 2019-00365, Order (Jan. 22, 2020) (granting
- 10 confidential treatment to the confidential terms of the Nucor contract for an
- indefinite time); In the Matter of: Application of Kentucky Power Company for
- 12 Approval of Renewable Energy Purchase Agreement for Wind Energy Resources
- 13 Between Kentucky Power Company and FPL Illinois Wind, LLC. P.S.C. Case No.
- 14 2009-00545, Order (July 31, 2019) (granting confidential treatment to confidential
- 15 contract terms for an indefinite time).

16 SECTION V

17 <u>Conclusion</u>

- 18 30. Based on the foregoing, the Confidential Information is entitled to
- 19 confidential protection. If the Commission disagrees, then the Commission should
- 20 hold an evidential hearing to protect Big Rivers' due process rights and to supply
- 21 the Commission with a complete record to enable it to reach a decision with regard
- to this matter. See Utility Regulatory Com'n v. Kentucky Water Service Co., Inc.,
- 23 642 S.W.2d 591 (Ky. App. 1982).

1	WHEREFORE, Big Rivers respectfully requests that the Commission classify		
2	and protect as confidential the Confidential Information.		
3	On this the $14^{\rm th}$ day of August, 2020.		
4		Respectfully submitted,	
5			
6		/s/ Tyson Kamuf	
7			
8		Tyson Kamuf	
9		Senthia Santana	
10		Gregory E. Mayes, Jr.	
11		Big Rivers Electric Corporation	
12		201 Third Street, P.O. Box 24	
13		Henderson, Kentucky 42419-0024	
14		Phone: (270) 827-2561	
15		Facsimile: (270) 844-6417	
16		tyson.kamuf@bigrivers.com	
17		senthia.santana@bigrivers.com	
18		gregory.mayes@bigrivers.com	
19			
20		Counsel for Big Rivers Electric	
21		Corporation	